

STATE OF MICHIGAN
IN THE BERRIEN COUNTY TRIAL COURT – BUSINESS DOCKET
811 Port Street, St. Joseph, MI 49085 • (269) 983-7111 • businesscourt@berriencounty.org

SHANE McINTOSH,

Plaintiff,

Case No. 2021-000063-CB
HON. DONNA B. HOWARD

v.

**JIM BRENNAN, and MARK
FRANCESCHI,**

Defendants.

Stephen W. Smith (P70723)
Attorney for Plaintiff
FOSTER SWIFT COLLINS & SMITH, PC
800 Ship Street, Suite 105
St. Joseph, MI 49085
269/983-1400
ssmith@fosterswift.com

**ORDER AND OPINION IN PART DENYING PLAINTIFF’S EX PARTE MOTION FOR
PRELIMINARY INJUNCTION AND SETTING MOTION FOR HEARING**

At a session of the Berrien County Trial Court, held
On the 25th day of March, 2021, in the City of
St. Joseph, Berrien County, Michigan

On or about March 23, 2021, Plaintiff Shane McIntosh filed his verified complaint for declaratory judgment and injunctive relief. Accompanying Plaintiffs’ complaint was an apparent *ex parte* emergency motion for a preliminary injunction, seeking a temporary restraining order, as well as a preliminary injunctive order. (*See*, Motion, 3/23/21, Brief, ¶¶ A-B, pp 10-11). On or about March 25, 2021, Plaintiff filed an amended *ex parte*¹ motion only apparently removing the language of the requested relief to include a “temporary restraining order” from the initial motion, only, but still requesting an *ex parte*, immediate order “restraining and enjoining” certain business actions of Defendants without a hearing. (*See*, Amended Motion, 3/25/21, ¶¶ A-C, p 2; Brief, 3/23/21, ¶¶ A-B, pp 10-11).

¹ The amended motion for preliminary injunction and original brief is *ex parte* as it seeks immediate relief without record of a proof of service or other notice to Defendants filed therewith.

Notably, there was no proposed restraining order included with Plaintiff's motion, brief, or the amended motion court filings for the Court's immediate consideration, namely stopping an apparent March 26th special meeting of BSE-USA, Inc. ("the Company"). In a separate *ex parte* communication with the Court, on March 24, 2021, Plaintiff's counsel did email a copy of a proposed order for preliminary injunction, however, in that proposed order Plaintiff referenced that the Court would have "held a hearing and received oral argument" prior to issuing said order. (Proposed PIO, p 1).

In his filings, Plaintiff essentially alleges that Defendants as the other two shareholders of the Company have improperly and unlawfully called for a special meeting of the shareholders to be held on March 26, 2021, to make decisions on the possible termination of Plaintiff, as a Company officer and director, and/or buying out of Plaintiff's shares in the Company. (Notice, 3/16/21, attached as Exhibit B to the Brief). Although coined only as a preliminary injunction order, the actual relief sought by Plaintiff seeks both a temporary restraining order to stop the March 26, 2021 special meeting, and preliminary injunction to preserve the status quo and prevent further alleged adverse actions by Defendants against Plaintiff's interests in the Company. (Brief, 3/23/21, pp 5-10).

Injunctive relief is an extraordinary remedy that should be granted only when justice so requires. *Fancy v Egrin*, 177 MichApp 714, 720 (1989). When considering a preliminary injunction or temporary restraining order, this Court must evaluate whether (1) the moving party made the required demonstration of irreparable harm, (2) the harm to the applicant absent such an injunction outweighs the harm it would cause to the adverse party, (3) the moving party showed that it is likely to prevail on the merits, and (4) there will be harm to the public interest if an injunction is issued. *Detroit Fire Fighters Ass'n, IAFF Local 344 v City of Detroit*, 482 Mich 18, 34 (2008). Specifically, the showing of irreparable injury must be "particularized." *Lash v. City of Traverse City*, 479 Mich 180 (2007). There must be a real and imminent danger of irreparable injury. *Michigan Council 25, AFSCME v Wayne County*, 136 MichApp 21, 25 (1984). Speculative or potential injuries do not suffice. *Pontiac Fire Fighters Union Local 376 v City of Pontiac*, 482 Mich 1, 11 (2008). That is, the mere apprehension of future injury or damage cannot be the basis for injunctive relief. *Id* at 9. Moreover, "[e]conomic injuries are not irreparable because they can be remedied by damages at law." *Thermatool Corp v Borzym*, 227 MichApp 366, 377 (1998). Similarly, the Supreme Court has explained that, "a preliminary injunction should not issue where an adequate legal remedy is available." *Pontiac Fire Fighters*, *supra* at 9.

The Court, having reviewed Plaintiff's *ex parte* amended motion for preliminary injunction, as well as brief in support, verified complaint, and proposed order hereby finds on the existing record that Plaintiff has not sufficiently demonstrated the elements required for this Court to issue an *ex parte* restraining order. First, the majority if not all of the alleged harm is economic, and therefore, can arguably be remedied by damages at law. Second, Plaintiff has not yet demonstrated an imminent danger of irreparable injury. "Imminent" is defined in Black's Law Dictionary (10th ed. 2014) in part as "an immediate, real threat." Rather, Plaintiff merely argues and speculates, without affidavits or other documentary evidence, about what might happen at the special meeting scheduled for March 26, 2021. There is Plaintiff's anticipation of injury, without a showing by the evidentiary support of any imminence.

With that said, the Court is concerned about the ongoing actions of the Company shareholders to the extent it may affect the good will or solvency of the Company from the preliminary evidence presented thus far to the Court, and recognizing that the Court's analysis of Plaintiff's request may change after proper notice to Defendants (and the non-party Company), and an opportunity to review additional evidence offered by all the parties at an evidentiary hearing, the Court further finds that an evidentiary hearing is warranted on the balance of Plaintiff's motion pursuant to MCR 3.310. Consequently, that portion of Plaintiff's motion seeking an *ex parte* immediate restraining order without a hearing, as proposed, is denied, but the request for a preliminary injunction is reserved pending an evidentiary hearing in which all of the parties, and if applicable, the Company, have an opportunity to participate. Therefore, this Court being otherwise advised in the premises holds as follows:

IT IS HEREBY ORDERED that that portion of Plaintiff's motion seeking an *ex parte* restraining order to stop the March 26th special meeting, without hearing is DENIED.

IT IS FURTHER HEREBY ORDERED that the balance of Plaintiffs' motion is RESERVED for further evidentiary hearing, which shall proceed remotely on **April 14, 2021 at 9:00 a.m. (EST)**, before this Court, pursuant to MCR 3.310. Plaintiffs shall timely notice and serve all Defendants with the summons, verified complaint, amended motion, and brief for preliminary injunction, inclusive of all exhibits or attachment thereto, this Opinion and Order, and a Notice of Hearing, which will include instructions from the Court for all parties to proceed with the hearing remotely via Zoom®. For purposes of any preliminary injunction hearing, service of filings, including Notice of Hearing, shall include a courtesy copy (electronic means will suffice) to: *Attorney Stephen*

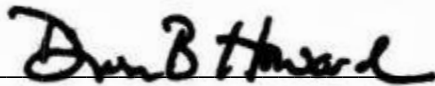
J. van Stempvoort, Miller Johnson, 45 Ottawa Avenue, Suite 1100, Grand Rapids, MI 49501-0306,
as reflected in Plaintiff's counsel's letter, attached to Plaintiff's Brief as Exhibit C.

IT IS FINALLY HEREBY ORDERED that Defendants, individually or collectively, are permitted, but not required, to file and serve a responsive brief to Plaintiff's motion no later than five (5) business days before the above scheduled evidentiary hearing. The requisite Judge's Copy, only, of briefs may be served electronically by emailing to: businesscourt@berriencounty.org. All other filings for the Court record directed to the Court Clerk must be made in hard-copy form.

IT IS SO ORDERED.

This is not a final order and does not close the case.

DATE: March 25, 2021



Honorable Donna B. Howard (P57635)
Berrien County Trial Court – Business Docket